Issue date: 17Oct2002

Case Nos. 2001-BLA-00589 and
2001-BLA-00590
In the Matter of
BETTY ENGLISH, OBO Estate of and Widow of
WILLIAM ALLEN ENGLISH, Deceased Miner,
Claimants
V.
PITTSBURG & MIDWAY COAL MINING,
Employer
and
DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,
Party-in-Interest.

APPEARANCES: (1)
Joseph H. Kelley, Esq.
Madisonville, Kentucky
For the Claimant.
Michael W. Alvey, Esq.
Owensboro, Tennessee
For the Employer.
BEFORE: Thomas F. Phalen, Jr.
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

This is a decision and order arising out of two claims for benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended by the Black Lung Benefits Act of 1977, 30 U.S.C. §§ 901-962, (hereinafter referred to as "the Act") and the regulations thereunder, located in Title 20 of the Code of Federal Regulations. Regulation section numbers mentioned in this Decision and Order refer to sections of that Title.

On March 22, 2001, this case was referred to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Programs, for a hearing. (Dir. Ex. 50) (2)

A formal hearing on this matter was conducted on December 5, 2001, in Madisonville, by the undersigned Administrative Law Judge. All parties were afforded the opportunity to call and examine witnesses, to cross examine witnesses, and to present evidence, as provided in the Act and the above referenced regulations.

ISSUES

The issues in this case are:
1. Whether the miner had pneumoconiosis as defined by the Act and regulations;
2. Whether the miner's pneumoconiosis arose out of coal mine employment;
3. Whether the miner's disability was due to pneumoconiosis; and
4. Whether the miner's death was due to pneumoconiosis.
(Dir. Ex. 50)
Based upon a thorough analysis of the entire record in this case, with due consideration accorded to the arguments of the parties, applicable statutory provisions, regulations, and relevant case law, I hereby mak the following:
FINDINGS OF FACT

Procedural History:

The miner, William Allen English, filed his initial application for benefits on September 28, 1979. (Dir. Ex. 49-357) It was denied by a Department of Labor claims examiner on February 22, 1980. (Dir. Ex. 49-312) Mr. English requested a hearing on March 3, 1980, and the claim was referred to the Office of Administrative Law Judges on August 29, 1981. (Dir. Ex. 49-310; Dir. Ex. 49-223) By letter dated September 25, 1984, Mr. English requested that his claim be withdrawn. (Dir. Ex. 49-6) By order dated October 1, 1984, Administrative Law Judge Richard E. Huddleston dismissed the claim. (Dir. Ex. 49-4) Consequently, Mr. English's 1979 claim is treated as if it were never filed. 20 C.F.R. § 725.306(b).

Mr. English filed a new application for Black Lung benefits on June 10, 1998. (Dir. Ex. 1) The claim was denied by a Department of Labor claims examiner on January 29, 1999 for failure to establish the existence of pneumoconiosis, that the disease arose out of his coal mine employment, and that he was totally disabled by pneumoconiosis. (Dir. Ex. 29) The District Director issued a Proposed Decision and Order Memorandum of Conference denying benefits on October 27, 1999. (Dir. Ex. 44) The miner requested a hearing before an administrative law judge on November 29, 1999. (Dir. Ex. 43) The claim was referred to the Office of Administrative Law Judges on February 24, 2000. (Dir. Ex. 45)

Unfortunately, Mr. English died on April 26, 2000. (Dir. Ex. 5) On May 31, 2000, Administrative Law Judge Robert L. Hillyard remanded the claim to the District Director to allow Mrs. English to file a survivor's claim and for the two claims to be consolidated. (Dir. Ex. 47) Mrs. English filed her survivor's claim on June 28, 2000. (Dir. Ex. 2) The survivor's claim was denied on October 16, 2000, by a Department of Labor claims examiner for failure to establish the existence of pneumoconiosis or that the miner' death was due to pneumoconiosis. (Dir. Ex. 32) On December 11, 2000, Mrs. English requested consolidation of the two claims and a formal hearing before an Administrative law Judge on both her claim and the miner's claim. (Dir. Ex. 35) On March 22, 2001, the claims were transferred to the Office of Administrative Law Judges. (Dir. Ex. 50) The undersigned conducted a formal hearing on this matter on December 5, 2001 in Madisonville, Kentucky.

Background:

Mr. English was born on February 17, 1935 and was sixty-five years old at the time of his death on April 26, 2000. (Dir. Ex. 1, 5) The highest grade level Mr. English completed was seventh grade. (Dir. Ex. 1) He married Betty English on March 11, 1957, and she remained his only dependent. (Dir. Ex. 1, 6; Tr. 14) Mrs. English was born February 28, 1935, and has no dependents. (Dir. Ex. 1, 2)

At his February 11, 2000 deposition, Mr. English testified that he worked as a coal miner from February 1952 to August 1976, when he quit due to a back injury. (Emp. Ex. 1) He stated that about half of his employment was underground. Mrs. English testified that her husband worked for Pittsburg & Midway Coal Mining Company for some years and he was employed as a welder in the tipple and anywhere a welder was needed. (Tr. 15) The parties stipulated to at least twenty-five years of coal mine employment. (Tr. 12)

Mrs. English testified that the miner was exposed to coal dust while working in the coal mines and he would come home with coal dirt all over his clothes and skin. (Tr. 16-17) She observed her husband cough up really "dark stuff" and his work clothes would commonly be solid black with dust. (Tr. 17) Mrs. English stated that the miner daily took medication and used inhalers for his breathing problem. (Tr. 18) Mr. English deposed that he began having a hard time breathing in 1978, so he went to a physicians who diagnosed pneumoconiosis. (Emp. Ex. 1) Mr. English treated with Dr. Frank Taylor at Trover Clinic until the time of his death. (Tr. 19) Mrs. English explained that in the last year of the miner's death, he was not able to be involved with home activities because he could not breathe. (Tr. 20) He died at home and was transported to Louisville for an autopsy. (Tr. 21) Mrs. English testified that the miner had a stroke ten years prior to his death. (Tr. 22) He underwent rehabilitation to learn to walk and talk again and relied on a walking cane thereafter. (Tr. 22-23) Mrs. English testified that her husband had smoked approximately 30 years at about a half pack per day and quit about 1992 or 1993. (Tr. 23-24) This is consistent with Mr. English's deposition testimony, in which he deposed that he smoked about half a pack of cigarettes a day for thirty years, quitting some time in the 1970's.

MEDICAL EVIDENCE

Chest X-rays:

X-ray Date Exhibit Number Physician Qualifications Reading

10-12-1979 Dir. Ex. 49-51 Dr. Spitz "B" reader (3), BCR (4) 0/0

10-12-1979 Dir. Ex. 49-71 Dr. Quillin "B" reader, BCR 0/0

10-12-1979 Dir. Ex. 49-54 Dr. Wiot "B" reader, BCR 0/0

12-28-1979 Dir. Ex. 49 @ 315 Dr. Cole "B" reader, BCR Completely negative

12-28-1979 Dir. Ex. 49 @ 314 Dr. Noveroske BCR Completely negative

12-28-1979 Dir. Ex. 49 @ 180 Dr. Wiot "B" reader, BCR Completely negative

04-25-1980 Dir. Exs. 36, 49 Dr. Mocker "B" reader 0/1; t; 3 zones

04-25-1980 Dir. Ex. 40 Dr. Wilkie BCR negative

04-25-1980 Dir. Ex. 49-50 Dr. Spitz "B" reader, BCR 0/0

04-25-1980 Dir. Ex. 49-53 Dr. Wiot "B" reader, BCR 0/0

04-28-1980 Dir. Exs. 38, 49 Dr. Pendergrass "B" reader, BCR Completely negative

12-08-1997 Dir. Ex. 28 Dr. Brandon "B" reader, BCR 2/1; p/t; 6 zones

06-30-1998 Dir. Ex. 8 Dr. Simpao 1/2; p/p; 6 zones

06-30-1998 Dir. Ex. 9 Dr. Sargent "B" reader, BCR No parenchymal abnormalities consistent with pneumoconiosis

06-30-1998 Dir. Ex. 10 Dr. Barrett "B" reader; BCR No parenchymal abnormalities consistent with pneumoconiosis; right hilar medistinal lumps

06-30-1998 Dir. Exs. 12, 41 Dr. O'Bryan "B" reader, BCI⁽⁵⁾ 0/1; s/q; 2 zones

09-28-1999 Dir. Exs. 12, 41 Dr. O'Bryan "B" reader, BCI Completely negative

On June 24, 1980, Dr. L. J. Wilkie was deposed. (Dir. Ex. 40; Dir. Ex. 49 @ 187-219, 161-177) He testified that he is board certified in radiology and is an A-reader. He testified that he has practiced with the Trover Clinic for the past two years. Dr. Wilkie reviewed the chest x-ray taken on April 25, 1980 and interpreted the x-ray as negative for coal workers' pneumoconiosis and no evidence of any interstitial fibrosis.

Dr. Henry Pendergrass was deposed on July 28, 1980. (Dir. Ex. 38; Dir. Ex. 49 @ 228-248) He recited his credentials and summarized his interpretations of a chest x-ray taken on April 25, 1980. Dr. Pendergrass found the film of excellent quality and he found no evidence of coal workers' pneumoconiosis or that Mr. English had inhaled coal dust. He opined that based on the x-ray and pre-employment physical examination, there was

nothing that would preclude the miner from continuing his employment. Dr. Pendergrass deposed that it was extremely unlikely that Mr. English had any breathing impairment.

Dr. John C. De Mocker was deposed on April 28, 1981. (Dir. Ex. 39) He summarized his credentials, which include being a B-reader. He testified that during his examination, he considered 26 years of above-ground coal mine employment and the results of a chest x-ray dated April 25, 1980. Dr. Mocker interpreted the x-ray as 0/0 for small opacities rounded and 0/1, type t under small opacities irregular. He read the x-ray as negative for coal workers' pneumoconiosis and deposed that the degree of scarring that 0/1 produces would not cause pulmonary impairment.

Pulmonary Function Tests:

Ex. Age/

Date No. Height FEV₁ 60 FVC 77 MVV 88 Valid Qualifies

10-24-1979 Dir. Ex. 49-87 44/69.5" 3.0 3.8 115.6 -- no

Interpretation: Marked decrease of vital capacity; a combined type defect

Validation: Found invalid by Dr. Richard P. O'Neill because temperature correction factor was not shown, the FVC/FEV1 curves showed inconstant and incomplete expiratory flow and variability greater than 5%, and the MVV curves showed inadequate volume increase.. (Dir. Ex. 28-75)

Ex. Age/

Date No. Height $FEV_1^{(9)}$ FVC MVV 111 Valid Qualifies

12-28-1979 Dir. Ex. 49, p. 322 44/70" 1.84 2.29 88 - yes

04-25-1980 Dir. Ex. 49, p. 297 45/70" 0.00 1.2 56 no yes

Comments: The technician commented that Mr. English did not put forth maximum effort. Dr. Gallo opined that the tracings were not optimal due to limited inspiratory effort.

06-30-1998 Dir. Ex. 8 63/69" 1.95 2.57 59.0 yes yes

Interpretation: Reduced vital capacity and flow volume curve. The test indicated a moderate degree of both restrictive and obstructive airway disease.

Found acceptable by Dr. N.K. Burki on August 1, 1998. (Dir. Ex. 8)

09-28-1999 Dir. Exs. 12, 41 64/69" 2.60 3.41 110 -- no

Post-bronchodilator 2.78 3.36 93 - no

Arterial Blood Gas Studies:

At Rest/

Test Date Exhibit Number pCO₂ pO₂ Qualifies After Exercise

12-28-1979 Dir. Ex. 49 @ 317 38.8 71.3 no At Rest

06-30-1998 Dir. Ex. 8 48.7 58.4 yes At Rest

Found acceptable by Dr. Burki on 10-07-98 (Dir. Ex. 8)

09-28-1999 Dir. Exs. 12, 41 40.7 80.6 no At rest

38.7 76.9 no After Exercise

Medical Opinions:

The record contains the treatment records for Mr. English from January 21, 1975 to June 28, 1979. (Dir. Ex. 49 @ 324-346) The treatment records show that Mr. English was treated by several doctors including Drs. Taylor, Wayne, Arnold, Gardner, Ainsworth, Dominguez, Pate, and Alexander for various conditions including: flu, nausea, vomiting, compound nevus of the left neck, foreign body in the right thigh, vascular headaches, herniated disks at L4 and L5, blurred vision, angiospastic

retinopathy, leg pain, bronchitis, and status post combined lumbar laminectomy and bilateral lateral fusion at L4 to the sacrum.

Dr. Valentino S. Simpao examined Mr. English on December 28, 1979. (Dir. Ex. 49 @ 318-321) He considered 26 years of coal mine employment, lastly as a welder, a medical history including frequent colds, wheezing attacks, arthritis and diabetes, and two back operations following a back injury in a mine accident in August of 1976. Dr. Simpao noted a smoking history of one-half pack of cigarettes per day for 23 years and chief complaints of a productive cough, wheezing, dyspnea and ankle edema for the past three years. Based on a physical examination, chest x-ray, blood gas study, pulmonary function study, and EKG, Dr. Simpao diagnosed chronic bronchitis and low back pain. He was unable to obtain accurate limitations of Mr. English's pulmonary impairment due to the back injury. In his opinion, Mr. English's mining history resulted in minimal coal dust exposure and would be questionable as a cause of the miner's bronchitis. Dr. Simpao is board certified in internal medicine and pulmonary medicine.

On June 30, 1998, Dr. Simpao examined Mr. English. (Dir. Ex. 8) He considered 11 years of coal mine employment, lastly as a welder, a history of smoking one-half pack of cigarettes a day since age 20, a history of pneumonia, wheezing, bronchial asthma, heart disease, diabetes mellitus and high blood pressure, and complaints of productive nocturnal dyspnea, chest pain, and shortness of breath. He also considered the results of an x-ray, a pulmonary function study, a blood gas study, and a physical examination. Based thereon, Dr. Simpao diagnosed coal workers' pneumoconiosis due to multiple years of coal dust exposure. He opined that the coal workers' pneumoconiosis had severely impaired Mr. English and he would not have the respiratory capacity to perform the work of a coal miner or comparable work.

Dr. Thomas Gallo examined Mr. English on April 25, 1980. (Dir. Ex. 37; Dir. Ex. 49 @ 295) He noted the miner had worked 24 years in a strip mining operation as a welder, a smoking history of three-quarters pack of cigarettes per day for the last 27 years, chief complaints of shortness of breath, dizziness, a productive chronic morning cough and chest pain, and a medical history of chronic low back pain with bilateral spinal facet rhizotomy L4 and L5 in October 1976 and bilateral fusion in 1977. On physical examination, Dr. Gallo noted low back pain and obesity but otherwise the lungs were clear. Dr. Gallo also considered the results of a chest x-ray, blood gas study, pulmonary function study and EKG. He diagnosed chronic low back pain and history compatible with chronic bronchitis.

Dr. Gallo was deposed on June 27, 1980. (Dir. Ex 37; Dir. Ex. 49 @ 266-294) Dr. Gallo summarized his credentials which include board certification in internal medicine and pulmonary disease. Dr. Gallo evaluated Mr. English at Trover Clinic and concluded that he did not have coal workers' pneumoconiosis based on the results of a chest x-ray. Dr. Gallo noted that a pulmonary function study was also completed but the miner did not put forth maximum effort. He deposed that the results of the blood gas study were normal. On physical examination, Dr. Gallo noted that Mr. English suffers from uncontrolled back pain which he opined could limit his ventilatory function. He added that when a person attempts to breathe deeply or cough, it aggravates uncontrolled chronic back conditions. Dr. Gallo noted that the miner has a smoking history and although he found no objective evidence of any respiratory impairment or disability, he concluded that if the miner had bronchitis or an obstructive pulmonary condition, cigarette smoking would be the major cause. He opined that coal workers' pneumoconiosis would not contribute to chronic bronchitis, chronic obstructive pulmonary disease or emphysema.

Dr. George Ainsworth was deposed on September 9, 1980. (Dir. Ex. 49-131) Dr. Ainsworth is an orthopedic surgeon at the Trover Clinic who began treating Mr. English in August 1976 for an injury sustained to his back a few days before. Dr. Ainsworth's testimony related only to the back injury and had no bearing on the issue of pneumoconiosis.

The record contains 56 pages of treatment records from Dr. Abi Rayner during the period of January 1997 to April 2000. (Dir. Ex. 13) Dr. Rayner treated the miner for various conditions including recurring ear infections since a stroke with facial dysesthesias, hypertension, chronic obstructive pulmonary disease, memory loss, viral gastroenteritis, sleep apnea, diabetes, influenza, and bronchitis.

The record also contains 107 pages of various medical records from Trover Clinic from June 1994 through March 2000. (Dir. Ex. 14) During this period, Mr. English was treated

by Drs. Clark, Taylor, Rayner, Roe, Donley, Naimaoli, Kaye, and Davis for the following conditions: right eye pseudophakia secondary to brainstem stroke, sleep apnea, chronic nasal drainage, chronic obstructive pulmonary disease, asthma, solar lentigo, arthritis, diabetes, hypertension, herpetic keratitis, rectal polyp and bleeding, thalamic pain syndrome, chronic headaches, back pain and dizziness.

Mr. English's treating physician, Dr. Frank H. Taylor, submitted treatment records from December 8, 1997 through June 2, 1998. (Dir. Ex. 7) During the December 8, 1997 consultation, Dr. Taylor noted mild wheeze and rhonchi. He strongly advised the miner to quit smoking and continued Mr. English on inhalers. Dr. Taylor diagnosed chronic obstructive pulmonary disease with emphysema, asthma and chronic bronchitis, obstructive apnea, and status post cerebrovascular accident. Dr. Taylor reexamined the miner on December 22, 1997 for breathing difficulties and noted no change in condition. He recommended the miner continue the inhalers and have a sleep study completed. As a follow up to a sleep study, Dr. Taylor examined Mr. English on January 15, 1998 and January 27, 1998. He noted that the sleep study evaluation found the miner had significant sleep apnea and hypoxemia. He recommended different treatment modalities for obstructive sleep apnea. Dr. Taylor diagnosed obstructive sleep apnea, primary snoring, chronic obstructive pulmonary disease, and active sleep with parosomnia and nocturnal hypoxemia. On February 3, 1998, Dr. Taylor examined the miner for a deep abrasion with some skin loss at the bridge of his nose with some secondary infection. He continued Mr. English on the inhalers but discontinued use of the nasal C-pap. Dr. Taylor followed up with the miner on March 10, 1998 and April 14, 1998 with acute sinusitis and sleep disturbance with obstructive sleep apnea and intolerance of the nasal C-pap. Notes from the May 12, 1998 examination revealed symptoms of mild congestion, mild wheeze and rhonchi. Dr. Taylor continued Mr. English on nasal steroid and nasal C-pap. Dr. Taylor diagnosed sleep apnea, chronic obstructive pulmonary disease, chronic rhinitis, and status post cerebrovascular accident. On June 2, 1998, Dr. Taylor provided a letter which stated that the miner had worked 25 years as a welder in above-ground coal mines and the fibrotic patter of the chest x-ray could not rule out coal workers' pneumoconiosis.

Dr. William M. O'Bryan examined Mr. English on September 28, 1999. (Dir. Ex. 12; Dir. Ex. 41) He considered 27 years of coal mine employment, primarily as a welder, but also performing some maintenance work; a history of dyspnea on exertion, limited movement due to back injury, and a productive cough; and a history of smoking one-half pack of cigarettes a day for 25 to 30 years before quitting at age 41 or 42. Physical examination revealed clear lung fields, no wheezing or rhonchi, and no edema. He further weighed the results of an x-ray, pulmonary function study, and blood gas study. Dr. O'Bryan diagnosed chronic bronchitis, obstructive sleep apnea, peripheral vascular disease, rhinitis, history of stroke, hypertension, arthritis and history of stomach ulcers. He did not find sufficient objective evidence to justify a diagnosis of coal workers' pneumoconiosis. Rather, Dr. O'Bryan attributed smoking as the cause of his chronic bronchitis. He further

opined that Mr. English had no functional impairment, according to the AMA Guidelines to Impairment, as a result of pneumoconiosis. He offered that the miner's smoking history was sufficient to cause some lung dysfunction and result in bronchitis.

Dr. O'Bryan was deposed on May 25, 2000. (Dir. Ex. 15) He provided his qualifications and summarized his examination of Mr. English on September 28, 1999. Dr. O'Bryan reaffirmed his diagnosis of chronic bronchitis, obstructive sleep apnea, peripheral vascular disease and hypertension. He found no evidence of coal workers' pneumoconiosis or any other chronic occupational disease of the lungs. He deposed that the miner's pulmonary conditions were related to a history of smoking. In his opinion, the miner retained the respiratory and ventilatory capacity to perform his usual coal mining employment. Dr. O'Bryan further testified that he had reviewed the death certificate which listed sleep apnea and secondary chronic obstructive pulmonary disease with asthma. He opined that none of these causes of death were related to coal workers' pneumoconiosis. Dr. O'Bryan agreed with Dr. Rayner that Mr. English had a significant asthmatic component to his obstruction but concluded that occupational exposure to coal dust was not a factor in producing the man's chronic bronchitis.

Mr. English died on April 26, 2000. The death certificate lists the causes of death as sleep apnea, chronic obstructive pulmonary disease and asthma. (Dir. Ex. 5) Dr. Abi Rayner, who completed the death certificate, also listed vascular dementia as another significant condition contributing to the miner's death but not resulting in the underlying cause of death.

Dr. Mark M. LeVaughn performed a post mortem and autopsy on April 27, 2000. (Cl. Ex. 1) His examinations consisted of both a gross and a microscopic examination. He diagnosed lobar pneumonia evidenced by consolidation of the right lung with abscess formation and fibrinous pleural adhesions and atelectasis of the right lung and associated with cardiomegaly and atherosclerotic cardiovascular disease. Dr. LeVaughn also diagnosed centrilobular emphysema with subpleural and perivascular black pigment deposition. He concluded that Mr. English died as the result of lobar pneumonia with abscess formation of the right lung. Dr. LeVaughn is a forensic pathologist.

Dr. O'Bryan provided a letter dated November 27, 2001, based on his review of the autopsy report. He opined that death was not caused by coal workers' pneumoconiosis. (Emp. Ex. 2) Dr. O'Bryan is board certified in internal medicine, pulmonary disease, and critical care medicine, and is a B-reader.

Dr. Simpao reviewed his June 30, 1998 report, the death certificate, and the autopsy report on or about September 28, 2001. (Cl. Ex. 2) He diagnosed pneumoconiosis arising out of coal mine employment. He opined that Mr. English's occupational-related pulmonary disease could have contributed to his death based on his many years of coal dust exposure, the evidence of restrictive and obstructive airway disease based on the pulmonary function studies, x-rays, and the autopsy finding of chronic bilateral changes with black pigment.

DISCUSSION

Miner's Claim

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Since claimant's current application was filed after March 31, 1980, this claim will be considered under the provisions of Part 718. In establishing entitlement to benefits, claimant must initially prove the existence of pneumoconiosis under § 718.202. Claimant has the burden of proving the existence of pneumoconiosis, as well as every element of entitlement, by a preponderance of the evidence. *See Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994). Pneumoconiosis is defined by the regulations at § 718.201:

- (a) For the purpose of the Act, "pneumoconiosis" means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes both medical, or "clinical," pneumoconiosis and statutory, or "legal," pneumoconiosis.
- (1) Clinical Pneumoconiosis. "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconiosis, i.e., the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, by it not limited to coal

workers' pneumoconiosis, anthracosilicosis, anthracosis, anthracilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.
(2) "Legal Pneumoconiosis. "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.
(b) For purposes of this section, a disease "arising out of coal mine employment" includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.
c) For purposes of this definition, "pneumoconiosis" is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure.
Section 718.201.
Section 718.202(a) sets forth four methods for determining the existence of pneumoconiosis.
(1) Under § 718.202(a)(1), a finding that pneumoconiosis exists may be based upon x-ray evidence.

In this case, there are 17 readings of six separate x-rays. There are 15 negative readings and two positive readings. The first three x-rays, dated October 12, 1979, February 28, 1979, and April 25, 1980, were unanimously found negative. These negative readings were made by two board-certified radiologists, one "B" reader, and eight physicians who are both "B" readers and board-certified radiologists.

The December 8, 1997 x-ray was found positive (category 2/1) by Dr. Brandon, who is both a "B" reader and a board-certified radiologist. No other physician interpreted the film. Therefore, I consider it positive for pneumoconiosis.

The June 30, 1998 x-ray was found positive (category 1/2) by Dr. Simpao, who possesses no particular qualifications for x-ray interpretation. It was reread as negative by Drs. Sargent, Barrett, and O'Bryan. Under Part 718, where the x-ray evidence is in conflict, consideration shall be given to the readers' radiological qualifications. *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *Aimone v. Morrison Knudson Co.*, 8 BLR 1-32 (1985); *Vance v. Eastern Associated Coal Corp.*, 8 BLR 1-68 (1985). Thus, it is within the discretion of the administrative law judge to assign weight to x-ray interpretations based on the readers' qualifications. *Goss v. Eastern Associated Coal Co.*, 7 BLR 1-400 (1984). Accordingly, greater weight may be assigned to an x-ray interpretation of a "B" reader. *Aimone, supra*. Even greater weight may be assigned to the reading of a dually certified reader. *Scheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984). Dr. O'Bryan is a "B" reader, and Drs. Sargent and Barrett are both "B" readers and board-certified radiologists. I place greater weight on the readings of Drs. O'Bryan, Sargent, and Barrett because of their superior credentials. Consequently, I consider this x-ray negative for pneumoconiosis.

The final x-ray, dated September 28, 1999, was interpreted by Dr. O'Bryan as completely negative. No other physician read the x-ray. I rely on Dr. O'Bryan's reading and find this x-ray to be negative for pneumoconiosis.

For the foregoing reasons, because the two most recent x-rays were found negative, and because the December 8, 1997 x-ray was not reread by another physician, I find that the x-ray evidence fails to establish the existence of pneumoconiosis pursuant to § 718.202(a)91).

(2) Under § 718.202(a)(2), a determination that pneumoconiosis is present may be based, in the case of a deceased miner, upon autopsy evidence. In this case, an autopsy was performed on April 27, 2000. (Cl. Ex. 1)

Dr. LeVaughn, who performed the autopsy, did not make a finding of pneumoconiosis, although he noted perivascular black pigment deposition. Dr. O'Bryan reviewed the report and concluded that Mr. English's death was not caused by pneumoconiosis. Dr. Simpao also reviewed this report and noted that the autopsy showed chronic bilateral change with black pigment. (12) He interpreted this finding as supportive of his diagnosis of pneumoconiosis.

Section 718.202(a)(2) states that, "A finding in autopsy of anthracotic pigmentation, however, shall not be sufficient, by itself, to establish the existence of pneumoconiosis." Consequently, I find that Dr. LeVaughn's finding of perivascular black pigment deposition is not sufficient to etablish pneumoconiosis, and Dr. Simpao's opinion that it supports his diagnosis of pneumoconiosis is misplaced. On this matter, I find Dr. O'Bryan's opinion more persuasive because it comports with the regulations. Thus, I find that the autopsy evidence fails to establish the existence of pneumoconiosis pursuant to § 718.202(a)(2).

(3) Section 718.202(a)(3) provides that pneumoconiosis may be established if any one of several cited presumptions are found to be applicable. In this case, the presumption of § 718.304 does not apply because there is no evidence in the record of complicated pneumoconiosis; § 718.305 is not applicable to claims filed after January 1, 1982. Finally, the presumption of § 718.306 is applicable only in a survivor's claim filed prior to June 30, 1982. Therefore, claimant cannot establish pneumoconiosis under subsection (a)(3).

(4) The fourth and final way in which it is possible to establish the existence of pneumoconiosis under § 718.202 is set forth in subsection (a)(4) which provides in pertinent part:

A determination of the existence of pneumoconiosis may also be made if a physician, exercising sound medical judgment, notwithstanding a negative x-ray, finds that the miner suffers or suffered from pneumoconiosis as defined in § 718.201. Any such finding shall be based on electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories. Such a finding shall be supported by a reasoned medical opinion. This section requires a weighing of all relevant medical evidence to ascertain whether or not claimant has established the presence of pneumoconiosis by a preponderance of the evidence. Any finding of pneumoconiosis under § 718.202(a)(4) must be based upon objective medical evidence and also be supported by a reasoned medical opinion. A reasoned opinion is one which contains underlying documentation adequate to support the physician's conclusions. *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19, 1-22 (1987). Proper documentation exists where the physician sets forth the clinical findings, observations, facts, and other data on which he bases his diagnosis. *Oggero v. Director, OWCP*, 7 B.L.R. 1-860 (1985).

This section requires a weighing of all relevant medical evidence to ascertain whether or not claimant has established the presence of pneumoconiosis by a preponderance of the evidence. Any finding of pneumoconiosis under § 718.202(a)(4) must be based upon objective medical evidence and also be supported by a reasoned medical opinion. A reasoned opinion is one which contains underlying documentation adequate to support the physician's conclusions. *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19, 1-22 (1987). Proper documentation exists where the physician sets forth the clinical findings, observations, facts, and other data on which he bases his diagnosis. *Oggero v. Director, OWCP*, 7 B.L.R. 1-860 (1985).

Of those physicians who addressed the presence or absence of pneumoconiosis, only Dr. Simpao diagnosed coal workers' pneumoconiosis. Dr. Taylor opined that he could not rule out pneumoconiosis. The physicians at the Trover Clinic and Dr. Rayner found chronic obstructive pulmonary disease and/or bronchitis but did not link the conditions to coal mine employment. Therefore, I do not consider them equivalent to diagnoses of pneumoconiosis. Drs. Gallo and O'Bryan did not find the existence of pneumoconiosis.

Dr. Simpao had the opportunity to examine Mr. English in 1979, at which time he did not diagnose pneumoconiosis, and, in fact, stated that it was not likely that the miner' chronic bronchitis was due to coal mine employment, and in 1998, when he did diagnose pneumoconiosis. Dr. Simpao, therefore, was able to assess any change in physical condition over a nineteen-year span of time. His 1998 report is well documented, but the x-ray which he interpreted as positive was reread as negative by three physicians who are better qualified at x-ray interpretation. However, this reason alone is insufficient to discount Dr. Simpao's opinion. Moreover, Dr. Simpao's opinion merits more weight because of his superior credentials. *Scott v. Mason Coal Co.*, 14 BLR 1-38 (1990). Therefore, I place some weight upon it. I find Dr. Taylor's statement that he could not rule out pneumoconiosis too indefinite to credit. *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988).

Dr. Gallo examined the miner in 1980. His opinion is well documented and reasoned. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986). It is supported by the five x-ray readings of the April 25, 1980 radiograph. All of these were negative. Furthermore, Dr. Gallo's clinical findings of clear lungs support his conclusion. Finally, Dr. Gallo's superior credentials entitle his opinion to greater weight.

Dr. O'Bryan's examination took place in 1999. His opinion is entitled to greater weight because it is well documented and reasoned and because of his qualifications. It is supported by the x-ray evidence and his clinical findings. Therefore, I place greater weight on his opinion.

In weighing Dr. Simpao's opinion against Dr. Gallo's and Dr. O'Bryan's, I find that Dr. Simpao's is entitled to more weight than Dr. Gallo's because he more recently examined Mr. English. Dr. Gallo's report is eighteen years older than Dr. Simpao's more recent report. Because pneumoconiosis is a progressive disease, Dr. Simpao was in a better position to determine whether the miner's disease had progressed. However, Dr. O'Bryan's examination is even more recent, and it is well documented and bolstered by the overall x-ray evidence. Consequently, while the evidence presents a close question, I find that the medical opinion evidence tends not to establish the existence of pneumoconiosis pursuant to § 718.202(a)(4).

Consideration of all the evidence under Section 718.202 leads to the conclusion that the claimant has failed to establish the existence of pneumoconiosis by a preponderance of the evidence. *Island Creek Coal Co. v. Compton*, ____ F.3d ____, 2000 WL 524798 (4th

Cir. 2000). I find the autopsy evidence most persuasive, followed by the x-ray evidence, which bolsters the autopsy findings. Therefore, notwithstanding Dr. Simpao's 1998 opinion, I conclude that the claimant has failed to establish the existence of pneumoconiosis.

Pneumoconiosis Arising Out Of Coal Mine Employment:

Assuming, *arguendo*, the claimant established the existence of pneumoconiosis, she must still prove that the miner's pneumoconiosis arose, at least in part, out of his coal mine employment. § 718.203(a). For a miner who suffers from pneumoconiosis and was employed for ten or more years in one or more coal mines, it is presumed that his pneumoconiosis arouse out of his coal mine employment. (*Id.*) Because I have found that the miner had established 25 years of coal mine employment, Mr. English is entitled to the rebuttable presumption that his pneumoconiosis, if he had it, arose out of coal mine employment.

Total Disability:

Next, the claimant must establish that the miner was totally disabled within the meaning of the Act. Total disability is defined as the miner's inability, due to pneumoconiosis, to perform his or her usual coal mine work or to engage in comparable gainful work in the immediate area of the miner's residence. § 718.204(b). Total disability can be established pursuant to one of the four standards in § 718.204(c) or the irrebuttable presumption of § 718.304, which is incorporated into § 718.204(b). The presumption is not invoked here because there is insufficient x-ray evidence of large opacities classified as category A, B, or C, and no biopsy or equivalent evidence.

Where the presumption does not apply, claimant shall be considered totally disabled if he meets the criteria set forth in § 718.204(b)(2), in the absence of contrary probative evidence. The Board has held that under § 718.204(b)(2), all relevant probative evidence, both like and unlike, must be weighed together, regardless of the category or type, to determine whether a miner is totally disabled. *Shedlock v. Bethlehem Mines Corp.*, 9

B.L.R. 1-195, 1-198 (1986); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 B.L.R. 1-231, 1-232 (1987). Furthermore, claimant must establish this element by a preponderance of the evidence. *Gee v. W.G. Moore & Sons*, 9 B.L.R. 1-4, 1-6 (1986).

Included in the record are five pulmonary function studies. These tests show that Mr. English was measured at 69.5, 70, 70, 69, and 69 inches, respectively. I resolve the height discrepancy by taking the average of the five listed heights. *Protoppapas v. Director, OWCP*, 6 BLR 1-221 (1983). Thus, I find that the miner was 69.5 inches tall for purposes of determining disability under the regulatory tables. A qualifying FEV₁ for this height when Mr. English was 44 years old is 2.26. The October 24, 1979 results exceed this value. The qualifying FEV₁ for this height at the age of 45 is 2.24. The April 25, 1980 test showed an FEV₁ of 0.00. The test was invalidated, however, by Dr. Gallo due to limited inspiratory effort. Therefore, while this test might show qualifying values, the study is invalid. The qualifying FEV₁ for this height at the age of 64 is 1.93. The September 28, 1999 results exceed this value. Therefore, these three tests did not yield qualifying, valid results.

The qualifying FEV₁ for Mr. English's height at the age of 44 is 2.26, and the qualifying FVC is 2.82. The December 28, 1979 results fall below these values, and therefore produced qualifying results. There is no indication that this study was invalidated. The qualifying FEV₁ for Mr. English's height at the age 63 is 1.95, and the qualifying MVV is 78. The June 30, 1998 results fall below these values, and therefore produced qualifying results. Moreover, this study was found acceptable by Dr. Burki. (Dir. Ex. 8)

I find the two most recent pulmonary function studies to be the most probative evidence because they are at least eighteen years more recent than the next most recent test. The 1998 study produced qualifying values, while both the pre- and post-bronchodilator studies of 1999 did not yield qualifying values. Because of the marked improvement shown in the 1999 study, I find that the 1998

test did not accurately represent Mr. English's pulmonary capacity. Therefore, I conclude that the pulmonary function study evidence tends not to establish total disability under § 718.204(b)(2)(i).

Subsection (b)(2) of § 718.204 provides for a finding of total disability where pulmonary function tests demonstrate FEV₁ values less than or equal to the values specified in the Appendix to Part 718 and such tests reveal FVC values or MVV values equal to or less than the applicable table values. Alternatively, a qualifying FEV₁ reading together with an FEV₁/FVC ratio of 55% or less may be sufficient to prove a totally disabling respiratory impairment under this subsection of the regulations. § 718.204(b)(2)(i) and Appendix B. There are three arterial blood gas studies, taken in 1979, 1998, and 1999. Only the June 30, 1998 study produced qualifying values. This study was found acceptable by Dr. Burki. The most recent test, however, produced non-qualifying results both at rest and after exercise. Because the most recent test, by more than one year, did not produce qualifying values, I find that the 1998 results were anomalous. I place more weight on the most recent study and conclude that the blood gas study evidence tends not to establish total disability under § 718.204(b)(2)(ii).

The total disability standard found at § 718.204(b)(2)(iii) is inapplicable to this case because the claimant did not present evidence of cor pulmonale with right-sided congestive heart failure.

Where total disability cannot be established under subparagraphs (c)(1), (c)(2), or (c)(3), § 718.204(b)(2)(iv) provides that total disability nevertheless may be found if a physician exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that claimant's respiratory or pulmonary condition prevents him from engaging in his usual coal mine work or comparable and gainful work. A reasoned opinion is one which contains underlying documentation adequate to support the physician's conclusions. Fields v. Island Creek Coal Co., 10 B.L.R. 1-19, 1-22 (1987). Proper documentation exists where the physician sets forth the clinical findings, observations, facts and other data on which he bases his diagnosis. Id. A physician's opinion need not be phrased in the words of "total disability" provided the assessment elaborates on claimant's impairment in such a way to allow the inference of total disability. Bueno v. Director, OWCP, 7 B.L.R. 2-337 (1984). A medical report which describes the severity of the impairment or the physical effect imposed by the respiratory or pulmonary impairment may be sufficient to establish total disability in conjunction with the exertional requirements of claimant's usual coal mine employment. Budash v. Bethlehem Mines Corp., 9 B.L.R. 1-48, 1-104 (1986).

Dr. Simpao found Mr. English totally disabled by his pneumoconiosis. Dr. Gallo found no evidence of respiratory impairment and explained that the miner's uncontrolled back

pain could limit ventilatory function. Dr. O'Bryan deposed that the miner retained the respiratory capacity to return to coal mine employment.

Dr. Simpao's opinion is supported by the qualifying pulmonary function study and blood gas study he administered. However, because the studies conducted by Dr. O'Bryan in 1999 failed to yield qualifying values, and disability due to pneumoconiosis does not improve, I find that the evidence suggests that the 1998 results were anomalies. Dr. Gallo's opinion is supported by his physical findings and the overall objective evidence. I find Dr. O'Bryan's opinion merits greater weight because it is bolstered by the overall pulmonary function and blood gas study evidence. It is further supported by the clinical findings of the varying examining physicians.

Because I find the opinions of Drs. Gallo and O'Bryan to be in line with the other objective medical data of record, I place more weight on their opinions than on Dr. Simpao's. Consequently, I find that the medical opinion evidence under § 718.204(b)(2)(iv) fails to establish total disability. Consideration of all the evidence under § 718.204(b)(2), both like and unlike, leads to the same conclusion. Thus, the miner's claim for benefits must be denied.

Widow's Claim

In order to be eligible for benefits, Mrs. English must prove that her husband's death was caused by pneumoconiosis. The Sixth Circuit has held that benefits are awarded to a survivor who establishes that pneumoconiosis is a substantially contributing cause or factor leading to the miner's death if it serves to hasten that death in any way. *Brown v. Rock Creek Mining Corp.*, 996 F.2d 812 (6th Cir. 1993); Section 718.205(c)(5). Survivors are not eligible for benefits where the miner's death was caused by a traumatic injury, or the principal cause of death was a medical condition not related to pneumoconiosis, unless the evidence establishes that pneumoconiosis was a substantially contributing cause of death. § 718.205(c)(4); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). In order to recover benefits, Mrs. English must prove that the miner had pneumoconiosis, that the disease arose out of coal mine employment, and that pneumoconiosis hastened her husband's death in some manner. Section 718.205(a)(1)-(3).

It has already been determined that the evidence fails to establish the existence of pneumoconiosis. As a result, Mrs. English cannot be found entitled to benefits. Assuming that pneumoconiosis had been established, however, she would still have to prove that her late husband's death was due to pneumoconiosis.

Death Due to Pneumoconiosis:

The death certificate lists the cause of death as sleep apnea, chronic obstructive pulmonary disease, and asthma. Vascular dementia was listed as another significant condition leading to, but not resulting in, the underlying cause of death. Dr. Rayner, who completed the death certificate, did not link the chronic obstructive pulmonary disease to coal mine employment. Therefore, I do not consider the findings on the death certificate as equivalent to pneumoconiosis.

Dr. LeVaughn concluded that the cause of death was lobar pneumonia with abscess formation of the right lung. This is not a finding of pneumoconiosis. I place great weight on Dr. LeVaughn's conclusion because he performed the autopsy and is a forensic pathologist. Dr. O'Bryan opined that death was not caused by pneumoconiosis. I place great weight on Dr. O'Bryan's opinion because it is consistent with the autopsy findings and conclusion of Dr. LeVaughn.

Dr. Simpao asserted that the miner's occupational-related pulmonary disease "could have contributed" to his death. Because Dr. Simpao's opinion is stated in terms of equivocation, I place less weight on his conclusion. *Justice*, 11 BLR 1-91.

For these reasons, I find that Mrs. English has failed to establish that Mr. English's death was due to pneumoconiosis. Accordingly, her claim for benefits must be denied.

Entitlement:
As the claimants have failed to establish the existence of pneumoconiosis, total disability due to pneumoconiosis, or death was due to pneumoconiosis, I find that they are not entitled to benefits under the Act.
Attorney's Fees:
The award of an attorney's fee under the Act is permitted only in cases in which claimants are found to be entitled to the receipt of benefits. Because benefits are not

ORDER

awarded in this case, the Act prohibits the charging of any attorney's fee to the claimants

for legal services rendered in pursuit of benefits.

It is therefore ORDERED that the claims of William A. English and Betty English for benefits under the Act are DENIED.



THOMAS F. PHALEN, JR.

Administrative Law Judge

NOTICE OF APPEAL RIGHTS

Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal to the Benefits Review Board within 30 days from the date of this decision, by filing a notice of appeal with the Benefits Review Board, P.O. Box 37601, Washington, D.C. 20013-7601. A copy of the notice of appeal must also be served on Donald S. Shire, Esquire, Associate Solicitor for Black Lung Benefits, Frances Perkins Building, Room N-2117, 200 Constitution Avenue, NW, Washington, D.C. 20210.

- 1. The Director, Office of Workers' Compensation Programs, was not present or represented at the hearing.
- 2. In this Decision, "Dir. Ex." refers to the Director's Exhibits, "Emp. Ex." refers to the Employer's Exhibits, "ALJX" refers to the Administrative Law Judge's Exhibits, and "Tr." refers to the official transcript of this proceeding.
- 3. A "B" reader is a physician who has demonstrated proficiency in assessing and classifying x-ray evidence of pneumoconiosis by successful completion of an examination conducted by or on behalf of the Department of Health and Human Services. Physicians' qualifications are a matter of public record at the HHS National Institute of Occupational Safety and Health reviewing facility at Morgantown, West Virginia. (42 C.F.R. § 37.51) Consequently, greater weight is given to a diagnosis by a "B" Reader. *See Blackburn v. Director, OWCP*, 2 B.L.R. 1-153 (1979).
- 4. Board-certified in radiology.
- 5. Board-certified in internal medicine with a sub-specialty is pulmonary disease.
- 6. Forced expiratory volume in one second.
- 7. Forced vital capacity.
- 8. Maximum voluntary ventilation.
- 9. Forced expiratory volume in one second.
- 10. Forced vital capacity.
- 11. Maximum voluntary ventilation.
- 12. Dr. LeVaughn's finding of "fibrinous" pleural adhesions were not found to be medically connected to the black pigmentation, so I will not infer such a connection in this case.